STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN CHRISTOPHER HART,

APPELLANT

APPELLATE CASE NO. 2017-001291

INITIAL BRIEF OF APPELLANT

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred in allowing the solicitor to argue in closing that appellant was "pure evil," and that "evil walks the streets, evil lives in Lexington County, evil is in this courtroom," since solicitors must tailor their remarks so as not to arouse the jurors' passions or prejudices?

2.

Whether the court erred in admitting incriminating statements by appellant that were given in response to questions by Sergeant Mefford where appellant was in custody and had not been provided *Miranda* warnings, since statements stemming from custodial interrogation of a defendant are inadmissible absent *Miranda* warnings?

3.

Whether the court erred in denying defense counsel's motion for a continuance where counsel continuously received discovery in the month leading up to trial, and the solicitor said the state "had been careful what it turned over," since fundamental fairness dictates counsel be given additional time to prepare, particularly where counsel did not have time to investigate Jeremy Washington's new statement since it was undisputed Washington said others made threats to kill the decedent?

STATEMENT OF THE CASE

On June 9, 2014, a Lexington County Grand Jury indicted appellant for the offense of murder. R. p. *(indictment). Appellant was tried before the Honorable Eugene C. Griffith, Jr., and a jury, May 22 – 26, 2017. Tr. IV, 1. Dayne Phillips represented appellant; D. Shawn Graham and Robert E. McNair represented the state. Tr. IV, 1. Appellant was found guilty and was sentenced to incarceration for fifty years. R. p. *(sentence sheet).

This appeal follows.

STATEMENT OF FACTS

Paula Justice, the decedent, lived at America's Value Inn. Tr. IV, 399, ll. 2-3. "She used drugs. She was a prostitute living day by day in hotels turning tricks. Worked as a confidential informant for Richland County," the solicitor offered. Tr. IV, 1016, ll. 14-16.

A narcotics officer from the Richland County Sheriff's Department said the decedent "had access to large drug dealers that had large amounts of drugs." Tr. IV, 474, l. 9-15; Tr. IV, 476, ll. 8-9. About a year before her death, the decedent and one Jeremy Washington were arrested with "several ounces of crack cocaine," and were charged with trafficking crack cocaine. Tr. IV, 477, l. 20 – 478, l. 6.

The decedent was not working as a confidential informant at the time. Tr. IV, 476, ll. 4-6. She "cooperated" with the investigation and pleaded guilty to a "reduced charge of trafficking ten to twenty-eight grams." Tr. IV, 478, l. 25 – 479, l. 2; Tr. IV, 492, l. 24 – 493, l. 11. Sentencing was deferred because the decedent "wanted to cooperate against Mr. Washington." Tr. IV, 493, ll. 1-4. "She bonded out at some point during that continuance [requested by Washington's attorney] and then I was informed that she had been killed," a Richland County solicitor testified. Tr. IV, 494, ll. 23-24.

On April 10, 2013, the day of the decedent's death, [s]he had told [another resident at the motel] she was going with a guy named KG." Tr. IV, 399, l. 8; Tr. IV, 400, l. 7; Tr. IV, 227, l. 24 – 228, l. 2. "She had told me that she was going with him because they had lined up some guys for her to go trick with." Tr. IV, 400, ll. 9-10.

Robert Greenberg was a tow truck driver who was near Lumberjack Road when he heard a gunshot. Tr. IV, 227, l. 1 – 228, l. 21. Shortly thereafter, he came upon the decedent's body lying on the side of the road. Tr. IV, 229, ll. 1-7. The decedent died from a "gunshot wound to

the head." Tr. IV, 591, ll. 15-17. "She was found with a condom and a crack pipe on the scene." Tr. IV, 272, l. 24 – 273, l. 3.

The decedent's cell phone was found on her person and showed she had recent communication with a contact listed as "KG." Tr. IV, 261, ll. 18-22; Tr. IV, 263, ll. 15-24. "KG was identified as a suspect because he was the last person that was seen with Paula Justice that day." Tr. IV, 305, ll. 23-24. Police identified the appellant, Christopher Hart, as "KG." Tr. IV, 305, l. 25 – 306, l. 4.

Appellant's girlfriend, Jessica Ussery, was being discharged from the hospital on April 10, 2013, and said appellant was supposed to give her a ride home but did not. Tr. IV, 277, ll. 23-25; Tr. IV, 279, ll. 4-6; Tr. IV, 280, l. 16-25. Ussery said appellant and Tevin Deloach came by her home to pick up some belongings the next day and left. Tr. IV, 282, ll. 10-20. Ussery said that was the last time she saw appellant. Tr. IV, 285, ll. 12-13.

Tevin Deloach initially denied involvement in Paula Justice's death. Tr. IV, 334, ll. 17-21. However, Deloach and appellant were both charged with murder. Tr. IV, 349, ll. 21-23. Deloach made bond on the murder charge but was subsequently arrested for committing first-degree burglary, grand larceny, and possession of a weapon. Tr. IV, 386, ll. 5-10. Deloach was therefore facing the possibility of two life without parole sentences when he testified against appellant. Tr. IV, 386, ll. 11-16.

Deloach said he was with appellant when they picked up the decedent. Tr. IV, 357, ll. 10-22. Deloach claimed that as they were turning in to pick her up, appellant "said he was gonna set her up to kill her." Tr. IV, 357, l. 24 – 358, l. 7. According to Deloach, he drove to Lumberjack Road, and appellant spoke to the decedent about Jeremy Washington, AKA "Munchkin" or "Fat Boy," and claimed appellant said, "he don't like snitches." Tr. IV, 358, l. 22 – 360, l. 1; Tr. IV,

482, l. 25 – 483, l. 6. Deloach claimed that he parked the car on Lumberjack Road, appellant and the decedent got out, and he "heard the gunshot and [appellant] ran back to the car with the gun in his hand." Tr. IV, 363, ll. 2-5. Deloach alleged appellant made a phone call and "said something like it's done." Tr. IV, 365, ll. 10-19. Deloach claimed that appellant killed the decedent "[b]ecause she was a CI and that Munchkin hired him to kill her for him so he wouldn't have to go to jail."[1] Tr. IV, 365, ll. 24-25.

The state argued Tevin Deloach was telling the truth, but admitted that he was hoping for help from the state in exchange for testifying. Tr. IV, 1034, ll. 4-7. "Does he want help for . . . testifying here in the courtroom? Of course he does." Tr. IV, 1034, ll. 5-7.

Alex Wallace took the stand at appellant's trial and confessed that he, not appellant, was the person who killed the decedent. Tr. IV, 820, ll. 10-11. Alex Wallace was also known by the nickname "KG" and grew up "walking distance" from where the decedent's body was found. Tr. IV, 823, ll. 1-14; Tr. IV, 980, ll. 8-17. Wallace was also charged with another murder in which he "shot another person in the head." Tr. IV, 821, ll. 8-12; Tr. IV, 629, ll. 5-17.

Alex Wallace testified he killed the decedent because: "She owed me some money." Tr. IV, 820, ll. 12-13. Wallace told detectives that the decedent owed him twelve-hundred and fifty dollars and refused to answer his calls. Tr. IV, 631, ll. 7-8. Wallace said he called appellant, since appellant knew the decedent, and asked appellant to "bring Paula to me. I told him that it was a money meeting about getting Paula to do prostitution." Tr. IV, 631, ll. 9-12. Wallace admitted that after appellant and the decedent arrived on Lumberjack Road, Wallace "shot her

---

[1] The state also introduced the testimony of Deandre Staley, who was an inmate at the Lexington County jail housed with appellant. Tr. IV, 566, ll. 7-10. Staley claimed that while he was doing pushups appellant volunteered that he "bodied the bitch" because she was a confidential informant, and that Jeremy Washington set her up to be killed. Tr. IV, 566, l. 17 – 567, l. 16.

once in the back of the head." Tr. IV, 631, ll. 13-22. Wallace said he then ran back towards his house, which was nearby. Tr. IV, 631, ll. 22-23.

Wallace said appellant was unaware he intended to kill the decedent. Tr. IV, 820, l. 24 – 821, l. 1. Alex Wallace denied that he was only confessing because appellant asked him to "take" the charge.[2] Tr. IV, 847, ll. 12-14.

Appellant took the stand and denied killing the decedent or knowing that she was going to be killed. Tr. IV, 915, ll. 18-22. "I did not kill Paula Justice." Tr. IV, l. 19. Appellant said that he knew the decedent and took her to Lumberjack Road for what he thought was going to be a "prostitution arrangement." Tr. IV, 916, ll. 20-23; Tr. IV, 918, ll. 3-5. Appellant said he did not know that Alex Wallace was going to kill the decedent. Tr. IV, 922, ll. 8-9. "I thought she was gonna trick, I was gonna get paid, take her back to where she came from, and it was gonna be over." Tr. IV, 918, ll. 8-11.

Appellant explained that after Justice was killed he went to New York because he had family there and because: "I was nervous and I went to the farthest spot that I could get to." Tr. IV, 939, ll. 11-20.

Officers learned that appellant "had been located and placed in custody in Utica, New York" on the murder warrant. Tr. IV, 599, l. 24 – 600, l. 2. The court held a *Jackson v. Denno*[3] hearing to determine the voluntariness of statements made by appellant to several officers while

---

2 The state called Terrence Flagler as a rebuttal witness. Tr. 976, ll. 3-7. Flagler was Alex Wallace's codefendant on Wallace's other murder case. Tr. IV, 976, ll. 14-17. Flagler claimed that while he and Wallace were in jail, Wallace said that appellant had "brainwashed" him, and convinced him to take appellant's charge. Tr. IV, 977, l. 14 – 978, l. 20.

3 *Jackson v. Denno*, 378 U.S. 368 (1964).

he was in custody. Tr. IV, 136, l. 25 – 137, l. 2. One of the statements was made to Sergeant Roy Mefford of the Lexington County Sheriff's Department over the telephone.

Sergeant Mefford learned appellant had been arrested and detained in New York for the murder. Tr. IV, 167, ll. 21-22. Sergeant Mefford telephoned the fugitive task force in New York: "[M]y intention was just to speak to the officer and just kind of get—get an idea of [appellant's] demeanor and whether he was going to speak with me. He offered to let [appellant] speak to me directly." Tr. IV, 168, ll. 4-17. Sergeant Mefford then spoke with appellant on the telephone. Tr. 168, ll. 18-20.

Sergeant Mefford was unaware whether anyone in New York had provided appellant *Miranda*[4] warnings and said that he did not provide appellant with *Miranda* warnings either: "I was simply asking if he would be willing to speak with us." Tr. 161, ll. 14-17; Tr. IV, 171, ll. 17-21. "I just asked him if he understood what he was being charged with . . ." Tr. IV, 168, ll. 22-23. I "introduced myself, asked him if he understood what—what he was being charged with and asked him if he was willing to speak to investigators if I did send them up to New York." Tr. IV, 169, ll. 19-22.

Sergeant Mefford said appellant's "initial response was to try to ask me details of the case, which I was not prepared or willing to do over the phone. Tr. IV, 169, l. 25 – 170, l. 2. "I explained that to him, that I would not discuss any kind of evidence over the phone, and then he made the statement to me 'How do you charge me with murder? You found a gun with my fingerprints on it?', or something, and at that point I thought that was interesting because I had not given any details of . . . who he was alleged to have killed or how they were killed." Tr. IV, 170; ll. 5-12. Mefford said he did not provide appellant with *Miranda* notifications because he

---

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966).

did not intend to interrogate appellant, but to ask if appellant would "be willing to speak with us." Tr. IV, 171, ll. 18-21.

Defense counsel argued appellant's statements to Sergeant Mefford should be excluded because: "[H]e was in custody, there was an interrogation, in other words, there were questions that were asked of him while being in—so custodial interrogation has been admitted that they did ask a question without providing *Miranda* warnings to him." Tr. IV, 172, l. 23- 173, l. 3; Tr. IV, 595, ll. 7-8; Tr. IV, 599, ll. 8-12; Tr. IV, 691, l. 23 – 692, l. 12. Defense counsel argued the statements should be excluded because Sergeant Mefford was "calling an inmate on a murder case and asking them are you willing to speak and then not having a *Miranda* advisement." Tr. IV, 175, ll. 11-14.

The state and the court agreed appellant was in custody. Tr. IV, 175, ll. 22-24. "I agree he's in custody. Everybody can see that." Tr. IV, 175, ll. 22-23. However, the solicitor said: "My argument is it's not interrogation because it's not a question likely to induce an incriminating response." Tr. IV, 175, l. 25 – 176, l. 2.

The court found appellant's statements to Sergeant Mefford were "voluntary comment" that "came out not responsive to are you willing to talk with us . . ." Tr. 174, ll. 2-12; Tr. IV, 599, ll. 8-12; Tr. IV, 691, l. 23 – 692, l. 12. "[I]t would seem to me that the detective was not allowed the opportunity to give *Miranda* because [appellant] started talking before he could take the next step." Tr. 176, ll. 5-8. The court said: "[A]re you willing to talk to us, should I send two detectives to pick you up, are [you] gonna waive extradition was the tenor of the question, not did you do it." Tr. IV, 173, ll. 9-12.

After Sergeant Mefford testified to the statement by appellant, appellant testified that he did not remember making the statement to Mefford, and that he did not say anything about a gun. Tr. IV, 938, l. 20 – 939, l. 1.

Jeremy Washington was transported to South Carolina and charged with the murder of the decedent less than a week before appellant's trial began. Tr. IV, 123, ll. 15-24; Tr. IV, 103, l. 9 – 104, l. 6. Defense counsel said: "The arrest warrant was given to me for Jeremy Washington yesterday. Jeremy Washington, a very critical witness in the case, was charged with murder now four years later." Tr. IV, 81, ll. 22-25. Defense counsel again moved for a continuance, noting that he had been receiving discovery throughout the month of April and up to the day of trial.[5] Tr. IV, 84, ll. 9-22. Defense counsel correctly explained that he had a "duty to conduct a reasonable investigation," and noted it was "impossible" to be prepared, since he was still receiving discovery the morning of trial. Tr. 85, ll. 2-14.

Counsel submitted a written motion for continuance in which he detailed the items of discovery that trickled in to him through the months of April and May—the motion is court's exhibit #2. Tr. IV, 85, l. 15-16; R. p. *(court's exhibit #2). Court's exhibit #3 is a disk containing the discovery defense counsel was provided from April up until the trial commenced, and is on file with this court. Court's exhibit #3 contains an FBI report of an interview with Jeremy Washington[6] dated November 9, 2016, wherein Washington stated "he did not hire or ask anyone to kill Justice," but "advised that he has stated openly on numerous occasions that he wanted

---

[5] On May 8, 2017, defense counsel had also moved before Judge Griffith, who was both the trial judge and the chief administrative judge, for a continuance of the May 22nd trial date based on the fact that he continued to get new discovery and needed time to conduct a reasonable investigation. Tr. III, 1; Tr. IV, 90, l. 22; Tr. III, 5, l. 12 – 6, l. 25; Tr. III, 7, ll. 17-19.

[6] Appellant directs this Court to a .pdf file of seventy-nine pages in length titled "Spivey- Full Report" at pages 62 and 63 of this portion of court's exhibit #3.

Paula dead." Court's exhibit #3. "Washington added "I have said that I wish someone would murder that bitch'. Washington also advised that others have stated that they were going to 'kill that bitch', referring to Justice." Court's exhibit #3. At that time Washington was in federal custody in California. Tr. IV, 103, ll. 23-24.

Defense counsel was not provided this information until April 7, 2017. Tr. IV, ll. 8-21. The state asked that a disk containing one file of discovery it provided to defense counsel on August 16, 2016, and another file it provided to defense counsel on April 7, 2017, be made a court's exhibit. This disk is court's exhibit #16 and is on file with this Court.[7]

Defense counsel noted the solicitor had a "continuing duty to disclose" and yet "a lot of this discovery is one to four years old . . ." Tr. IV, 94, ll. 4-14; Tr. IV, 86, ll. 4-9. Counsel argued appellant was being denied "the opportunity to present a full and complete defense under *Crane v. Kentucky*[8] and, of course, *Washington v. Texas*[9] . . ." Tr. IV, 92, ll. 22 – 93, l. 2.

The solicitor replied that he believed: "that [appellant is] a high ranking member of the Blood gang and has the ability to reach out and touch people, so taking all of that into consideration I have been careful about what I turn over regarding people for fear that their name would be drug into this needlessly." Tr. IV, 117, ll. 8-13. "That has been a consideration of mine." Tr. IV, 117, l. 13. "I don't make a practice of waiting until the last minute, but there are reasons why, which I stated earlier about this case, that there's a particular time I think that's more appropriate than others to turn things over." Tr. IV, 120, ll. 8-12.

---

[7] A comparison of court's exhibit #3 and court's exhibit #16 shows that both the state and the defense agree that defense counsel was not provided the FBI reports regarding Jeremy Washington until April 7, 2017.

[8] *Crane v. Kentucky*, 476 U.S. 683 (1986).

[9] *Washington v. Texas*, 388 U.S. 14 (1967).

In denying defense counsel's motion for a continuance, the court said: "I understand there was some late discovery provided." Tr. IV, l. 2. "[B]ut it doesn't seem to me like there was much provided by the State recently other than the changed story of the—Washington." Tr. IV, 124, ll. 6-9. "I think the case is ready to be tried and should go forward, so respectfully I'm gonna deny that motion for continuance." Tr. IV, 124, ll. 17-19.

In closing, the solicitor appealed to the jury's passions and prejudices by arguing the killing was: "Not even a robbery that goes bad, but pure evil." Tr. IV, 1017, ll. 13-14. "Evil walks the streets. Evil lives in Lexington County." Tr. IV, 1017, ll. 14-15. Defense counsel objected: "Objection. The evil characterization is improper." Tr. IV, 1017, ll. 16-17. The court overruled the objection, saying: "Malice is an element the State's got to prove. He can argue what he thinks he's proved."[10] Tr. 1017, ll. 18-22. The solicitor continued: "Evil is in this courtroom."

---

10 Even though the court surprisingly found the solicitor's argument that appellant was an evil person permissible, counsel felt strongly enough about this argument that he asked for a mistrial. Tr. IV, 1060, l. 22 – 1061, l. 6; Tr. IV, 1018, ll. 11-12.

ARGUMENT

1.

The court erred in allowing the solicitor to argue in closing that appellant was "pure evil," and that "evil walks the streets, evil lives in Lexington County, evil is in this courtroom," since solicitors must tailor their remarks so as not to arouse the jurors' passions or prejudices.

Standard of review

"The trial court has broad discretion when dealing with the propriety of the solicitor's argument, including the question of whether to grant a defendant's mistrial motion. The trial court's discretion will not be overturned absent a showing of an abuse of discretion amounting to an error of law that prejudices the defendant." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) (internal citations omitted).

Discussion

The solicitor improperly characterized appellant as evil in closing argument, and the court overruled defense counsel's objection. A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices. *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Solicitors must "confine their comments to the facts presented and reasonable inferences from such facts." Id. at 326, 468 S.E.2d at 625.

"On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions

adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 338, 503 S.E.2d at 166-67 (internal citations omitted).

In *State v. Day*, 341 S.C. 410, 424, 535 S.E.2d 431, 438 (2000), the South Carolina Supreme Court found the solicitor's repeated references to the defendant by his nickname "Outlaw" "infect[ed] the trial with unfairness, and deprive[d] [the defendant] of due process of law." The Court noted that the solicitor's use of the term "outlaw" was "not used to prove any matter in controversy," but to impugn the defendant's character. *Id.* at 423, 535 S.E.2d at 438. Similarly, in *State v. Hawkins*, 292 S.C. 418, 422, 357 S.E.2d 10, 13 (1987), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), the solicitor's repeated use of the term "Mad Dog" was improper, and "infected the trial with unfairness by arousing the passion and prejudice of the jury and interjected an arbitrary factor into the jury's deliberations."

The solicitor argued to the jury in closing that appellant was "pure evil," and that: "Evil walks the streets, Evil lives in Lexington County," and "Evil is in this courtroom." Tr. IV, 1017, ll. 13-24. The court surprisingly overruled defense counsel's objection to this manifestly unfair and improper characterization of appellant.

Merriam-Webster's dictionary defines evil as: morally reprehensible; sinful; wicked; arising from actual or imputed bad character or conduct. "Evil." *Merriam-Webster.com.* 2018. https://www.merriam-webster.com (22 August 2018). The argument that a person is so evil he should be found guilty, regardless of the evidence, so that he is not living in the community with

the jurors is a powerful argument, and is completely at odds with the American judicial system. Just like so-called "golden rule" arguments are barred because their potency is such that it unfairly enhances the likelihood of a verdict on an improper basis, so is the argument that a defendant is so evil he must not be left to walk the same streets frequented by jurors and their families. "Evil" is a far more unfair and prejudicial characterization even than the characterization of the defendant in *Day* as an outlaw, or the defendant in *Hawkins* as "Mad Dog."

The solicitor went beyond the boundaries of proper closing argument, inflamed the jury, and prejudiced appellant's case. The solicitor's comments infected the trial with unfairness, as they were not used to prove malice, but instead to portray appellant as an evil person that the jury should be afraid to have "walk[ing] the streets" and "liv[ing] in Lexington County."

Appellant submits the solicitor's comments denied him due process of law. There was not overwhelming evidence of appellant's guilt. Appellant never confessed and there was no physical evidence that identified him as the shooter. Alex Wallace testified that he, Wallace, killed the decedent and appellant did not know it was going to happen. The state relied on circumstantial evidence and the testimony of appellant's codefendant Tevin Deloach, who was also charged with the decedent's murder, and who the state admitted was testifying in the hopes of getting "help" from the state in resolving his case.

2.

The court erred in admitting incriminating statements by appellant that were given in response to questions by Sergeant Mefford where appellant was in custody and had not been provided *Miranda* warnings, since statements stemming from custodial interrogation of a defendant are inadmissible absent *Miranda* warnings.

Standard of review

"The trial judge's determination of whether a statement was knowingly, intelligently, and voluntarily made, requires an examination of the totality of the circumstances surrounding the waiver." *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 247 (1990) (internal quotations omitted) (quoting *State v. Doby,* 273 S.C. 704, 258 S.E.2d 896 (1979)). "On appeal, the conclusion of the trial judge on issues of fact as to the voluntariness of a confession will not be disturbed unless so manifestly erroneous as to show an abuse of discretion." *Id.* (citing *State v. Livingston,* 223 S.C. 1, 73 S.E.2d 850 (1952)).

"Part of the State's burden during [a *Jackson v. Denno*[11] hearing] is to prove that the statement was voluntary and taken in compliance with *Miranda.*" *State v. Creech*, 314 S.C. 76, 84, 441 S.E.2d 635, 639 (Ct. App. 1993) (citing *State v. Middleton,* 288 S.C. 21, 339 S.E.2d 692 (1986)). "The trial judge's resolution of the issue of voluntariness of a statement will not be disturbed on appeal absent an error of law." *Id.* (citing *State v. Atchison*, 268 S.C. 588, 599, 235 S.E.2d 294, 299 (1977)).

Discussion

"[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of

---

[11] *Jackson v. Denno*, 378 U.S. 368 (1964).

procedural safeguards effective to secure the privilege against self-incrimination." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). In *Miranda*, the United States Supreme Court "presumed that interrogation in certain custodial circumstances is inherently coercive and held that statements made under those circumstances are inadmissible unless the suspect is specifically informed of his *Miranda* rights and freely decides to forgo those rights." *New York v. Quarles*, 467 U.S. 649, 654 (1984).

"When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers received be presumed compelled and that they be excluded from evidence at trial." *Quarles*, 467 U.S. at 664 (1984) (O'Connor, J., concurring in part and dissenting in part). "Failure to administer *Miranda* warnings creates a presumption of compulsion." *Oregon v. Elstad*, 470 U.S. 298, 307 (1985). "Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda.* Thus, in the individual case, *Miranda's* preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm." *Id.*

"In order to secure the admission of a defendant's statement, the State must affirmatively show the statement was voluntary *and* taken in compliance with *Miranda.*" *State v. Middleton*, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986) (emphasis in original).

Here, the parties agreed that appellant was in custody, since he was jailed in New York on the murder warrant. The state did not claim that appellant had received *Miranda* warnings. Sergeant Mefford did not provide appellant with *Miranda* warnings, and did not know whether anyone in New York had done so. Sergeant Mefford asked appellant questions about the case over the telephone, and appellant made the statement: "How do you charge me with murder?

You found a gun with my fingerprints on it?" Tr. IV, 170, ll. 5-12. The state argued this statement by appellant was incriminating because Mefford had not told appellant how the decedent was killed.

The trial court allowed the admission of this statement, taken while appellant was in custody and had not been read *Miranda*, finding that appellant's statement was "voluntary comment," and "not responsive." Tr. IV, 174, ll. 2-12.

In *Rhode Island v. Innis*, 446 U.S. 291, 298 (1980), the United States Supreme Court discussed the meaning of "interrogation" for purposes of *Miranda*. In *Innis*, police officers arrested the defendant for the robbery of a cab driver at gunpoint, advised him of *Miranda*, and he invoked his right to counsel. *Id.* at 293-94. While driving the defendant to the police station, two officers in the car were conversing, and one said to the other that there was a school for handicapped children nearby, and "God forbid one of them might find a weapon with shells and they might hurt themselves." *Id.* at 294-95. The defendant "then interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located," and led them to the gun. *Id.* at 295.

In addressing whether the defendant in *Innis* was "interrogated" the Court noted that the "starting point" for this analysis was the *Miranda* Court's observation that "by custodial interrogation, we mean **questioning** initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 298. (internal alterations and quotations omitted) (quoting *Miranda*) (emphasis in original). The Court decline to construe "interrogation" as narrowly as "express questioning," *Id.* at 298. In addition to "express questioning," the Court concluded that the "functional equivalent" of express questioning is subject to *Miranda* safeguards. *Id.* at 300-01.

"[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301. *Innis* and *Miranda* thereby make clear that "express questioning"—asking a suspect in custody questions—is interrogation.

The Court denied Innis relief, finding the officers' conversation was not express questioning or its functional equivalent. *Id.* at 302-03. Unlike the case at hand, the defendant in *Innis* was not subject to questioning, he merely overheard statements by the officers.

In *State v. Howard*, 296 S.C. 481, 486, 374 S.E.2d 284, 286-87 (1988), the South Carolina Supreme Court applied *Innis* to determine whether a jailed defendant who was not *Mirandized* and volunteered incriminating information to his probation officer, Mr. Polk, absent any questioning by the probation officer had been "interrogated." The Court applied *Innis*, and found no interrogation occurred: "There is no indication in the record that Polk expressly questioned [the defendant]. Neither [the defendant] nor Polk testified that **questioning** occurred during this visit. Likewise, we find that Polk's **actions** were not reasonably likely to elicit an incriminating response from the suspect." *Id.* at 489, 374 S.E.2d at 288 (emphasis added).

Unlike the case at hand, where Sergeant Mefford asked appellant questions about the case, the defendant in *Howard* was not asked questions, which would fulfill the "express questioning" prong of *Innis* and require the statement's suppression. Instead, the defendant in *Howard* only made incriminating statements in response to the probation officer's actions—actions which were found not likely to elicit an incriminating response.

"Interrogation is either express questioning or its functional equivalent." *State v. Easler*, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997), *overruled on other grounds by State v. Greene*,

423 S.C. 263, 814 S.E.2d 496 (2018). *See State v. Primus*, 312 S.C. 256, 258, 440 S.E.2d 128, 128 (1994) (defendant was not subject to interrogation where he "blurted out" statement when he first saw police officer). Unlike the situation in *Primus*, where the defendant blurted out a statement upon seeing an officer and the officer had not questioned Primus, here Sergeant Mefford questioned appellant.

See State v. Thompson, 276 S.C. 616, 623, 281 S.E.2d 216, 220 (1981) (conversation with officer who finger-printed defendant was not interrogation where defendant initiated the conversation and the officer's statements were not such that he should have known they were reasonably likely to elicit an incriminating response). Unlike the case at hand, where appellant was expressly asked questions, the defendant in *Thompson* was not asked questions and the officer's statements were not the functional equivalent of interrogation.

In *State v. Franklin*, 299 S.C. 133, 136, 382 S.E.2d 911, 913 (1989), the South Carolina Supreme Court found that an officer's "[r]eading or attempting to read the *Miranda* rights form" was not interrogation. Franklin was arrested, and Investigator Huff "advised Franklin that he was under arrest for the charge of murder and that Huff was investigating the homicide at the Holiday Inn. Franklin responded, "I ain't did nothing." *Id.* at 912, 382 S.E.2d at 135. Investigator Huff "stated that he wanted to give Franklin his rights, to which Franklin responded, 'What do I need rights for?' Huff said that it appeared that the man was beaten to death. Franklin said, 'I ain't beat nobody. All I did was hold him while Rodney hit him.'" *Id.* Investigator "Huff told Franklin that he wanted to give him his rights and that he should not say anything else. Franklin stated, 'I don't have anything else to say. I want to see an attorney.'" *Id.*

Franklin argued his statements should have been suppressed pursuant to *Miranda.* Investigator Huff did not ask Franklin questions, and the Court found Investigator Huff's attempt

to read Franklin *Miranda* warnings was not the "functional equivalent" of interrogation. *Id.* at 136, 382 S.E.2d at 913. Here, unlike in *Franklin*, there was express questioning—fulfilling the first prong of *Innis* and necessitating suppression without ever reaching the second prong of whether an officer's actions or statements were the functional equivalent of questioning.

Here, Sergeant Mefford's questions to appellant of whether he understood what he was charged with and whether he was willing to speak with police officers was express questioning. Appellant did not "blurt out" a response like the defendant in *Primus*, but rather, responded to the officer's questions about whether he "understood" what he was charged with and whether he was willing to speak to law enforcement. Likewise, *Franklin* is inapposite as the investigator in *Franklin* did not engage in express questioning, and instead only made statements, unlike Sergeant Mefford's questioning of appellant here.

There was no dispute at trial that appellant was in custody. The state argued appellant was not subject to interrogation because it believed Mefford's questions were not likely to induce an incriminating response. Tr. IV, 175, l. 25 – 176, l. 2. Likewise, the court found appellant's statements were "voluntary comment" that "came out not responsive to are you willing to talk with us . . ." Tr. 174, ll. 2-12. This was error, as the court failed to recognize Mefford engaged in "express questioning," and as such, whether Mefford's remarks were likely to elicit an incriminating response was irrelevant. Because Sergeant Mefford did engage in express questioning, the statements should have been suppressed. *Rhode Island v. Innis*, 446 U.S. 291, 298 (1980).

3.

The court erred in denying defense counsel's motion for a continuance where counsel continuously received discovery in the month leading up to trial, and the solicitor said the state "had been careful what it turned over," since fundamental fairness dictates counsel be given additional time to prepare, particularly where counsel did not have time to investigate Jeremy Washington's new statement since it was undisputed Washington said others made threats to kill the decedent.

Standard of review

"The trial court's denial of a motion for a continuance will not be disturbed on appeal absent a clear abuse of discretion." *State v. Wrapp*, 421 S.C. 531, 535, 808 S.E.2d 821, 823 (Ct. App. 2017) (internal quotations omitted) (quoting *State v. Ravenell*, 387 S.C. 449, 454, 692 S.E.2d 554, 557 (Ct. App. 2010)). In South Carolina "[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record." *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007).

"Even if there was no evidentiary support, in order for an error to warrant reversal, the error must result in prejudice to the appellant." *State v. Geer*, 391 S.C. 179, 190, 705 S.E.2d 441, 447 (Ct. App. 2010) (internal quotations omitted) (quoting *State v. Irick*, 344 S.C. 460, 464, 545 S.E.2d 282, 284 (2001)).

Discussion

In *State v. Tanner*, 299 S.C. 459, 463, 385 S.E.2d 832, 834 (1989), the South Carolina Supreme Court found that the state's "eve of trial" production of untested evidence warranted the granting of a continuance so that the defendant could adequately ascertain its full evidentiary

value. "Where the continuance request is occasioned by the State's untimely compliance with a discovery request, the defendant is entitled to sufficient time to ascertain the full evidentiary value of the evidence." *State v. Whipple*, 324 S.C. 43, 54–55, 476 S.E.2d 683, 689 (1996) (Finney, C.J., dissenting) (citing *Tanner, supra*).

In *State v. Squires*, 248 S.C. 239, 244, 149 S.E.2d 601, 603 (1966), the South Carolina Supreme Court found no abuse of discretion where there was "no showing that any other evidence on behalf of the appellants could have been produced, or that any other points in their behalf could have been raised had more time been granted for the purpose of preparing the case for trial."

In *State v. Geer*, 391 S.C. 179, 190, 705 S.E.2d 441, 447 (Ct. App. 2010), the prosecution produced an audiotape of the defendant's arrest the evening before trial. This Court determined "there was no violation of Rule 5, and the trial court did not err in denying Geer's motion for a continuance" since the "audiotape provided evidence that served to inculpate rather than exculpate her." *Id.* at 191, 705 S.E.2d at 447.

Court's exhibit #3 is a disk containing the discovery defense counsel was provided from April up until the trial commenced, and is on file with this court. It contains potentially exculpatory information, such as an FBI report of an interview with Jeremy Washington[12] dated November 9, 2016, wherein Washington stated "he did not hire or ask anyone to kill Justice," but "advised that he has stated openly on numerous occasions that he wanted Paula dead." Court's exhibit #3. "Washington added "I have said that I wish someone would murder that bitch'.

---

12 Appellant's counsel directs this Court to a .pdf file of seventy-nine pages in length titled "Spivey- Full Report" at pages 62 and 63 of this portion of court's exhibit #3. The solicitor agreed the state did not provide this information to defense counsel until April 7, 2017. Tr. IV, 1083, ll. 8-24.

Washington also advised that others have stated that they were going to 'kill that bitch', referring to Justice." Court's exhibit #3.

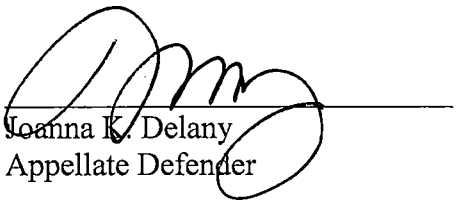
A defendant has "the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19 (1967). "[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (internal quotations omitted) (quoting *California v. Trombetta,* 467 U.S. 479, 485 (1984)).

This was a highly unusual case. Alex Wallace confessed at trial that he, not appellant, killed the decedent. Jeremy Washington was brought back to South Carolina and arrested for the murder of the decedent the week prior to appellant's trial. Defense counsel had only recently been provided with Washington's potentially exculpatory statements to FBI agents that a number of other persons said they were going to kill the decedent. The state admitted it had deliberately withheld some of the discovery until the eve of trial due to its belief that appellant could "arrange hits."

Appellant submits the court erred in failing to grant defense counsel a continuance, as it deprived appellant of his right to present a complete defense. Without time to speak to Washington and investigate the identity of the other people who stated an intent to kill the decedent, counsel was unable to perform a reasonable investigation. This is a highly unusual case where appellant was prejudiced because he was denied the opportunity to present a complete defense. *Crane v. Kentucky*, 476 U.S. 683 (1986).

CONCLUSION

Based on the foregoing arguments, appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN CHRISTOPHER HART,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on John Christopher Hart, 334197, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 22nd day of August, 2018.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 22nd day of August, 2018.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028